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6
SUPERIOR COURT OF THE STATE OF CALIFORNIA
 7
COUNTY OF ALAMEDA

8
 9 Coordination Proceeding Special Title
 9 (Rule 1550(b))

JCCP NO. 4332
 CASE NO. RG05223276

10
 11 ***Cellphone Termination Fee Cases***

**DECLARATION OF DONALD M. FALK
 IN SUPPORT OF DEFENDANT
 CINGULAR WIRELESS LLC'S MOTION
 TO COMPEL ARBITRATION AND STAY
 ACTION**

12
 13 This Document Relates To:

Date: November 8, 2005
 Time: 4:00 p.m.
 Dept: 22
 Judge: Hon. Ronald M. Sabraw

14
 15 *Rel v. Cingular Wireless LLC*

16 Action Filed: July 14, 2005

17
 18 I, Donald M. Falk, do hereby declare:

No Trial Date Set

19
 20 1. I am a partner with the law firm of Mayer, Brown, Rowe & Maw LLP, and I am one
 21 of the counsel for defendant Cingular Wireless LLC ("Cingular"). I have personal knowledge of
 22 the matters stated herein, and, if called upon, I could and would testify thereto.

23
 24 2. On August 25, 2005, I sent a letter to counsel for plaintiff Angela Rel, informing them
 25 that, pursuant to Ms. Rel's agreement with Cingular, which I enclosed with the letter, she is
 26 subject to a contractual obligation either to arbitrate any claims arising out of or relating to the
 27 agreement with Cingular or to pursue her claims in small claims court. I also informed them that
 28 Cingular mailed a revised arbitration provision to its customers in July 2003; that the revised
 provision was designed to make arbitration less expensive and more convenient for Cingular's

1 customers; and that Cingular was making its benefits available to all current and former customers,
2 including plaintiff. A true and correct copy of this letter (and its accompanying enclosures) is
3 attached hereto as Exhibit A to this Declaration.

4 3. As of the signing of this Declaration, we have received no response to this letter from
5 counsel for plaintiff.

6 4. A true and correct copy of Virgin Mobile USA, LLC's Terms and Conditions (also
7 available at <http://www.virginmobileusa.com/corporate/termsAndConditions.do>) is attached as
8 Exhibit B.

9 5. A true and correct copy of TracFone's Terms and Conditions (also available at
10 http://www.tracfone.com/content/terms_conditions.jsp) is attached as Exhibit C.

11 6. Mayer, Brown also represented Cingular in *Bucy v. AT&T Wireless Servs., Inc.*, a
12 case filed in the Superior Court for San Mateo County, No. CIV 432021. In *Bucy*, three plaintiffs
13 sued AT&T Wireless, Cingular, and Sprint. Sprint introduced a declaration in support of its
14 motion to compel arbitration in *Bucy* providing versions of its Terms and Conditions of Service
15 between May 2001 and June 2003. A true and correct copy of the Declaration of Vincent P.
16 DeSantis in support of Sprint's motion to compel arbitration in *Bucy* is attached as Exhibit D.

17 7. Attached as Exhibit E to this Declaration is a copy of Discover Bank's arbitration
18 clause, which was included in the Exhibits to Discover Bank's Writ Petition in *Discover Bank v.*
19 *Superior Court (Boehr)* (Cal. App. 2d Dist. No. B161305), at Volume 1, pages 89-90. Those
20 Exhibits constituted the record before the California Supreme Court in *Discover Bank v. Superior*
21 *Court* (2005) (S113725), reported at 36 Cal.4th 148.

22 8. A true and correct copy of JAMS Policy on Consumer Arbitrations Pursuant to Pre-
23 Dispute Clauses is attached as Exhibit F.

24 9. A true and correct copy of the National Arbitration Forum Fee Schedule is attached
25 as Exhibit G.

26 10. The American Arbitration Association ("AAA") maintains copies of its rules on its
27 web site.

28

1 11. A true and correct copy of the AAA's Supplementary Procedures for Consumer-
2 Related Disputes (also available at <http://www.adr.org>) is attached as Exhibit H.

3 12. A true and correct copy of the AAA's Commercial Arbitration Rules (also available
4 at <http://www.adr.org>) is attached as Exhibit I.

5 13. A true and correct copy of selected pages from the Third Amended Complaint in
6 *Ball v. GTE Mobilnet of California*, No. 98AS03811 (Cal. Super. Ct., Sacramento Cty.), is
7 attached as Exhibit J.

8 14. A true and correct copy of Plaintiffs' Request for Dismissal, filed in *Ball v. GTE*
9 *Mobilnet of California*, No. 98AS03811 (Cal. Super. Ct., Sacramento Cty.), is attached as Exhibit
10 K.

11 I declare under penalty of perjury under the laws of the State of California that the foregoing
12 is true and correct. Executed this 3rd day of September, 2005 at Palo Alto, California.

Don M. Falk

Terms and Conditions / Keep Your Service Active

By activating your TracFone service ("Service"), customer ("You") acknowledges and agrees to the following terms and conditions:

To maintain TracFone Wireless service and keep your TracFone phone number, you must purchase and add an additional TracFone Prepaid Wireless Airtime card before the due date that is displayed on the TracFone. If you do not purchase and add additional airtime prior to the due date, your TracFone service will deactivate and you will lose your TracFone telephone number.

TracFone Airtime cards expire one year from the date of purchase from an authorized TracFone retailer. Airtime units added to your TracFone do not expire with active service.

TracFone Prepaid Wireless Airtime rate plans, card denominations and these Terms and Conditions of Service are subject to change without prior notice.

Tampering or falsification or entering of codes not properly authorized by TracFone, or the unauthorized use of your TracFone, may result in immediate discontinuance of Service and prosecution to the full extent of the law. TracFone reserves the right to cancel any service without notice.

TracFone Prepaid Wireless Airtime is issued in unit increments. Units are deducted from the TracFone wireless phone in the following manner:

Number of units charged per minute of Airtime used

1 Unit = 1 minute of local or long distance calls made from inside your home calling area.

2 Units = 1 minute of roaming calls made from outside your home calling area.

0.5 Units = 1 text message.

For Single Rate phone models

1 minute of local, long distance or roaming calls = 1 unit of airtime

Receiving text messages = no charge

Sending text messages = 0.3 units per message

Your TracFone will only operate with TracFone Prepaid Wireless Airtime cards and cannot be activated with other wireless or cellular services. The purchase of TracFone wireless airtime cards is non-refundable.

You will be charged for all time during which the TracFone is connected to, or using, the wireless system of the carrier or any other provider of wireless or ancillary services. Use of a wireless system typically begins when the user initiates a call by pressing the "send" or "call" button or upon receiving a call and does not end until the user presses the "end" button or the call is otherwise terminated. All calls are deducted in full-unit increments; partial airtime usage is rounded up to the next unit.

For outbound calls, you may be charged airtime for incomplete and/or busy-no answer calls. With incoming calls, you will be charged airtime upon pressing any key on the keypad to answer the call.

No credit is given for dropped calls. 911 Calls are FREE. If you are in an area where your phone is searching for a signal or there is no signal, it is highly probable that a call to 911 will not go through. Do not rely on this function in an emergency situation. Locate the nearest landline phone and call for help. Calls such as 411 and 611 are not free with TracFone and shall be charged at regular airtime rates. Please refer to the **"Number of units charged per minute of Airtime used"** section, above.

TracFone does not control whether toll charges apply to calls made to your TracFone. Those charges are governed by the rates and charges set by the caller's service provider.

You will not be able to make or receive calls on your TracFone from or to any location outside of the United States, Puerto Rico or the U.S. Virgin Islands. To make international calls, you will need to purchase a prepaid international long distance calling card that permits 1-800 dialing access. TracFone offers this service, which you may purchase at www.tracfone-iid.com. Your TracFone will deduct units at regular airtime rates for calls to any 1-800 number, including our Customer Care 1-800 number.

Caller ID, Call Waiting, Voice Mail and Text Messaging may not be available in analog service areas or outside

your home calling area. Airtime units are used when you access your voice mail or retrieve voice mail messages from your TracFone and send or read received text messages.

You must accept the TracFone telephone number assigned to your TracFone at the time of activation.

Service is subject to transmission limitations caused by atmospheric, topographical and other conditions. Further, Service may be temporarily refused, limited, interrupted or curtailed due to system capacity limitations, technology migration or limitations imposed by the carrier, or because of equipment modifications, upgrades, repairs or relocations or other similar activities necessary or proper for the operation or improvement of the carrier's radio telephone system. TracFone shall have no liability for Service failures or limitations of Service.

Keeping Your Service Active

During the first 60 days from phone activation, when you add a single 40, 100, 200, or 400-minute TracFone Prepaid Wireless Airtime card, your active service period or due date will extend 60 days from the date the new card is added. After your first 60 days from phone activation, when you add any one of these cards, your due date will be extended 60 days from the current due date to a maximum of 120 days. When you add two or more of these cards during or after your first 60 days from phone activation, your due date will extend to a maximum of 120 days from the date the new cards are added.

The due date can be extended past 120 days, up to 365 days from the date you add a TracFone 1 year prepaid wireless service card or Double Minute prepaid plan card. The due date can be extended to a maximum of 730 days from the date you add any combination of the 1 year prepaid wireless service card and/or the Double Minute prepaid plan card.

If you do not purchase and add additional airtime prior to the due date, your TracFone service will be deactivated and you will lose your TracFone phone number. Even if your service is deactivated, your TracFone can be reactivated by purchasing and adding any TracFone Prepaid Wireless Airtime card. However, once reactivated, your TracFone will be assigned a new phone number. Airtime which remained at the time of deactivation will remain on your TracFone if it is reactivated within 60 days from the deactivation date. However, airtime which remained at the time of deactivation will be lost if your TracFone Service remains deactivated longer than 60 days.

Remember, you must purchase and add a new TracFone Prepaid Wireless Airtime card before the due date is reached in order to keep your TracFone service active, even if you have units remaining. You can find TracFone Prepaid Wireless Airtime cards at the retailer where you purchased your TracFone, at over 60,000 retailers nationwide or at www.tracfone.com. To find a TracFone authorized retailer near you, please visit our website at www.tracfone.com.

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